YAP CHIN WAH v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
AZMAN ABDULLAH JCA
AZMI ARIFFIN JCA
[CIVIL APPEAL NOS: W-01(A)-603-11-2023, W-01(A)-604-11-2023, W-01(A)-607-11-2023 & W-01(A)-608-11-2023]
12 AUGUST 2025

Abstract – *A bona fide redundancy arises when there is a surplus of labour due to legitimate business needs, such as a restructuring or cost-cutting exercise, even if the work itself continues to exist. The key is that the employer's needs now require fewer employees to perform the same tasks. The fact that the job functions of the retrenched employees are absorbed by existing staff does not negate a genuine case of redundancy. The focus is on the business's operational needs, not solely on whether the specific job has ceased to exist.*

LABOUR LAW: *Employment – Dismissal – Retrenchment – Redundancy – Claimants resident engineers employed on fixed term contract of employment – Review by Government on large-scale projects resulted in significant changes to project – Project changes from project delivery partner model to turnkey or 'design and build' contract – Project's organisational chart and site supervision staff restructured – Claimants identified as redundant and retrenched – Whether there was redundancy – Whether bona fide redundancy arose – Whether there was surplus of labour due to legitimate business needs – Whether fact that job continued to exist meant that there was no genuine need for retrenchment – Industrial Relations Act 1967, s. 20*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Appeal – Claimants resident engineers employed on fixed term contract of employment – Review by Government on large-scale projects resulted in significant changes to project – Project changes from project delivery partner model to turnkey or 'design and build' contract – Project's organisational chart and site supervision staff restructured – Claimants identified as redundant and retrenched – Industrial Court held in claimants' favour and awarded compensation – High Court quashed Industrial Court's awards – Whether there was genuine need for retrenchment*

The respondent ('company') was in the business of engineering consultancy and was appointed by Prasarana Malaysia Bhd to work on the Light Rail Transit Line 3 (Western Corridor) Project ('project'). At the material time, MRCB-George Kent Sdn Bhd ('MRCB-GK') was appointed as the 'project

delivery partner' responsible for the management and supervision of the project, *albeit* that the ultimate owner of the project was and is the Malaysian Government. The appellants ('claimants') in these four appeals were resident engineers employed on a fixed-term contract of employment by the company to work on the site of the project. Following the 14th General Elections, the then new Malaysian Government implemented a review of all large-scale projects, including the project. This was followed by an announcement by the Ministry of Finance ('MOF') that, while the project would continue, there would be significant changes made. This changed the project, from a project delivery partner model to a fixed price, *ie,* turnkey or 'design and build' contract. Directives were later given by MRCB-GK to collectively restructure the project's organisational chart and site supervision staff to support the new 'design and build' model. In order to restructure its operations, the company was also required to reconsider its manpower requirements. Ten employees, including the claimants, were found to be redundant and the company proceeded to terminate them. The matter culminated in a claim at the Industrial Court. The Industrial Court concluded that the claimants were terminated without just cause and excuse and ordered the company to pay compensation to the claimants. Upon a judicial review, the High Court quashed the four awards of the Industrial Court. Hence, the present appeal. It was the claimants' averment that redundancy was not made out for the following reasons, *inter alia*, (i) there was no proof in support of redundancy. The organisational chart after the claimants' retrenchment showed the same number of employees working on the project as before the claimants' retrenchment; (ii) there was no freeze in new hires for the project; and (iii) there was no proof tendered to show a genuine financial need for retrenchment to take place.

Held (dismissing appeals)
Per Azmi Ariffin JCA delivering the judgment of the court:

(1) There is a general misconception that redundancy only arises when the job or work that was carried out by the claimant who had been retrenched no longer exists. Redundancy arises when there is a surplus of labour which is linked to legitimate business needs of the employees. The retrenchment in this case was necessitated by the cost review/optimisation exercise, which was conceded during the hearing before the Industrial Court, that the changes announced by the MOF would necessitate the restructuring by the company. There was a genuine case of redundancy because the work, although continuing to exist, required fewer employees to carry it out. (paras 32, 34 & 42)

(2) The Industrial Court's error laid in its failure to consider the fiscal impact of the cost review/optimisation exercise on the company's financial ability to sustain the existing workforce and in disregarding the

A evidence that the roles and functions of the claimants had been consolidated. Thus, the fact that the retrenched employee's job function continued to exist and was being done by a lesser number of existing (non-retrenched) staff was not a case of no redundancy. On the contrary, it was because the employer had decided to downsize its operations that
B there was now a need for fewer staff to do the same job. Thus, in such a situation, the retrenched employee was deemed to be 'surplus' to the employer's needs. There was also no hiring of any new resident engineers to do the job that was performed by the claimants. (paras 43 & 44)

C **(3)** The Industrial Court awards, in respect of the claimants, were tainted with errors of law. The High Court was correct in allowing the judicial review and quashing the awards. (para 45)

Case(s) referred to:

Chairil Bahari Ibrahim v. MMSB Consult Sdn Bhd [2021] ILRU 0832; [2021] 2 LNS
D *0832 (Award No. 832 of 2021)* ***(refd)***

Chapman & Others v. Goonvean & Rostowrack China Clay Co Ltd [1973] 2 All ER 1063 ***(refd)***

Hariprasad v. Divelkar [1957] AIR SC 121 ***(refd)***

Lee Khurn Ying v. MMSB Consult Sdn Bhd & Another [2021] ILRU 0831 (Award No. 831 of 2021) ***(refd)***

E *Melipoly Enterprise Sdn Bhd v. Ong Hong Yeok & Anor [2024] 4 CLJ 692 CA* ***(refd)***

MMSB Consult Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor And Other Cases [2024] CLJU 94 HC ***(refd)***

Mohamad Nazly Nasir Mohamad v. MMSB Consult Sdn Bhd [2021] ILRU 0834; [2021] 2 LNS 0834 (Award No. 834 of 2021) ***(refd)***

F *R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***

Siemens Malaysia Sdn Bhd v. Cheong Kok Leng [2004] 1 ILR 195 (Award No. 1010 of 2003) ***(refd)***

Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] CLJU 131 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

G *William Jack & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA* ***(refd)***

Woo Vain Chan v. Malayawata Steel Bhd [2016] 10 CLJ 176 CA ***(refd)***

Yap Chin Wah v. MMSB Consult Sdn Bhd [2021] 2 ILR 345 (Award No. 836 of 2021) ***(refd)***

Legislation referred to:

H Industrial Relations Act 1967, s. 20

For the appellant - Muhammad Amir Sharipuddin & Muhamad Nur Aiman Toharudin; M/s Razif Abdul Aziz & Partners

For the respondents - Thavalingam C Thavarajah & Aida Yasmin Cheree Mohamad; M/s T Thavalingam & Co

I *[Editor's note: For the High Court judgment, please see MMSB Consult Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor And Other Case [2024] CLJU 94 (affirmed).]*

Reported by Lina E

JUDGMENT

Azman Abdullah JCA:

Introduction

[1] There are four appeals before us, namely:

(i) Court of Appeal Civil Appeal No: W-01(A)-603-11-2023
Yap Chin Wah v. Mahkamah Perusahaan Malaysia & Another;

(ii) Court of Appeal Civil Appeal No: W-01(A)-604-11-2023
Lee Khurn Ying v. MMSB Consult Sdn Bhd & Another [2021] ILRU 0831 (Award No. 831 of 2021)

(iii) Court of Appeal Civil Appeal No: W-01(A)-607-11-2023
Mohd Nazly Nasir Mohamad v. Mahkamah Perusahaan Malaysia & Another; and

(iv) Court of Appeal Civil Appeal No: W-01(A)-608-11-2023
Chairil Bahari Ibrahim v. MMSB Consult Sdn Bhd & Another

[2] The appellant in each appeal were employed as resident engineers on a "fixed-term" contract of employment by MMSB Consult Sdn Bhd. The appellants were retrenched from employment. They disputed the retrenchment and filed complaints with the Director General of Industrial Relations ("DGIR") under s. 20 of the Industrial Relations Act 1967, claiming that they had been dismissed, without just cause or excuse. There was no resolution or amicable settlement of the disputes before the DGIR.

[3] As such, the complaints were referred to the Industrial Court for adjudication. In the proceedings before the Industrial Court, the appellants were named as "the claimants" whereas MMSB Consult Sdn Bhd was named as "the company". For the sake of convenience and consistency, we shall adopt the same nomenclature and refer to the appellants collectively as "the claimants", and MMSB Consult Sdn Bhd as "the company".

[4] In the Industrial Court, the claimants asserted, *inter alia,* that there was no genuine redundancy underlying the company's decision to terminate their services. According to the claimants, their positions and functions were still in existence at the time when they were retrenched. The claimants also asserted that the company was not undergoing any financial difficulties which required that they be retrenched. The claimants also contended that the selection criteria for retrenching the claimants was flawed.

[5] The company's response was that owing to the cost optimisation/cost review exercise as directed by the Ministry of Finance, a review/ restructuring had to be done, wherein, *inter alia*, the claimants' functions/ duties were consolidated and assigned to other resident engineers. The project which was being undertaken by company was scaled down and the

tenure for completion was extended. Consequently, the company required fewer resident engineer to perform the job. Hence, the claimants were "surplus" to the company's staffing requirement and were therefore redundant and were lawfully and properly retrenched from employment.

[6] The Industrial Court rejected the company's response and agreed with the claimants and handed down awards in respect of each of the claimants wherein it held, *inter alia*, that there was no redundancy and that the retrenchment was vitiated or flawed for other reasons. As such, the Industrial Court found in favour of the claimants and ordered compensation to be paid by the company.

[7] The company applied to the High Court for judicial review to quash the awards of the Industrial Court. By a decision dated 12 October 2023 ("the said decision"), the High Court held that the Industrial Court had committed errors of law and quashed the awards of the Industrial Court. See: *MMSB Consult Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor And Other Case* [2024] CLJU 94; [2024] AMEJ 0089 (HC).

[8] The four appeals are all directed at the said decision of the High Court. Although these applications emanate from separate awards of the Industrial Court, they nevertheless relate to what are essentially identical background facts. Thus, all four cases were heard together in the proceedings before the Industrial Court and the contents of the awards themselves are substantively identical. The cases in the High Court were consolidated and heard together. As such, to facilitate the determination of these appeals, we think that it would be convenient to combine and decide these appeals in a single judgment as they are interrelated.

Background Facts

[9] The business of the company is engineering consultancy. The company was appointed by Prasarana Malaysia Berhad ("Prasarana") to work on the Light Rail Transit Line 3 (Western Corridor) Project ("the LRT3 project"). At the material time, MRCB-George Kent Sdn Bhd ("MRCB-GK") was appointed as the 'Project Delivery Partner' responsible for the management and supervision of the LRT3 project, *albeit* that the ultimate owner of the LRT3 project was and is the Malaysian Government.

[10] The claimants were specifically employed to work on the site of the LRT3 project light rail transit 3 – Western Corridor, as resident engineers, for a two-year fixed period from 3 July 2017 until 30 June 2019 with a basic salary per month as follows:

(i) Yap Chin Wah RM16,000;

(ii) Lee Khurn Ying RM16,000;

(iii) Nazly bin Nasir Mohamad RM11,000; and

(iv) Chairil Bahari bin Ibrahim RM13,800.

[11] Following the 14th General Elections on 9 May 2018, the then new Malaysian Government implemented a review of all large-scale projects, including the LRT3 project.

[12] MRCB-GK had instructed the company to put on hold all reviews and approvals for shop drawings and submissions and to stop overtime and shift duty site work. Thereafter, there was an announcement by the Ministry of Finance ("MOF") on 12 July 2018 that, while the LRT3 project would continue, there would be significant changes made, including, *inter alia*, the following:

(i) the timeline for completion of the LRT3 project was revised from 2020 to 2024;

(ii) there would be a reduction in the overall construction size and design of the LRT train depot and LRT stations due to the change from 42 sets of 6-car trains to 22 sets of 3-car trains; and

(iii) the construction of five stations would be shelved and the 2km underground tunnel and underground station at Persiaran Hishammuddin, Shah Alam would be cancelled.

[13] The above changes effectively entailed significant changes to and an overall reduction in scope, whereby the LRT3 project was changed from a project delivery partner model to a fixed price (*ie,* turnkey or 'design and Build') contract. The various contractors involved in the LRT3 project were informed of the cost review exercise involving the MOF *via* letters dated 2 July 2018 and 9 July 2018, whereby more aspects of the LRT3 project were put on hold or omitted entirely. Various meetings were also held with MRCB-GK to discuss the cost optimisation exercise, including, *inter alia,* the omission of the six stations.

[14] Around October 2018, directives were given by MRCB-GK to collectively restructure the LRT3 project organisation chart and site supervision staff to support the new 'design and build' model. The company then implemented a salary deferment scheme for all staff earning above RM5,000 a month. In order to restructure its operations pursuant to the cost-reduction directives of the Malaysian Government and to meet the revised scope of the LRT3 project, the company was required to reconsider its manpower requirements. The company's Chief Resident Engineer (Siew Kam Leong – "Roger Siew") had accordingly reviewed and assessed the various employees under his purview, and the various teams were restructured based on the changes to the LRT3 project.

[15] As a result, significant changes were made, including the merging of both M&E teams into one, and the transfer of quality assurance responsibilities from the company (under the PDP model) to MRCB-GK (under the 'design and build' model). Consequently, ten employees

(including the claimants) were found to be redundant. Thereafter, the company had, *via* a letter dated 29 August 2018 proceeded to terminate the claimants from employment effective on 31 October 2018, due to the primary reason that MRCB-GK had instructed the company to partially hold certain portions of the project as part of the project's cost optimisation exercise by the Malaysian Government.

Industrial Court

[16] Dissatisfied with the termination, the claimants made representations for reinstatement pursuant to s. 20 of the Industrial Relation Act 1967 within the prescribed 60 days of their dismissal which was thereafter referred to the Industrial Court by the Honourable Minister of Human Resources for adjudication. The dispute was ventilated before the Industrial Court. On 22 April 2021, the Industrial Court concluded that the claimants were terminated without just cause or excuse and ordered the company to pay compensation as follows:

(i) a sum of RM80,000 ("Award No. 836 of 2021") to Yap Chin Wah (See: *Yap Chin Wah v. MMSB Consult Sdn Bhd* [2021] 2 ILR 345);

(ii) a sum of RM208,000 ("Award No. 831 of 2021") to Lee Khurn Ying (See: *Lee Khurn Ying v. MMSB Consult Sdn Bhd* [2021] ILRU 0831);

(iii) a sum of RM55,000 ("Award No. 834 of 2021") to Nazly Nasir Mohamad (See: *Mohamad Nazly Nasir Mohamad v. MMSB Consult Sdn Bhd* [2021] ILRU 0834; [2021] 2 LNS 0834); and

(iv) a sum of RM276,000 ("Award No. 832 of 2021") to Chairil Bahari Ibrahim. See: *Chairil Bahari Ibrahim v. MMSB Consult Sdn Bhd* [2021] ILRU 0832; [2021] 2 LNS 0832.

[17] The Industrial Court delivered four identical awards in so far as the issue of liability is concerned. Hence, it will suffice if we refer to Award 836 of 2021 (*Yap Chin Wah v. MMSB Consult Sdn Bhd* [2021] 2 ILR 345 (Award No. 836 of 2021)) where the Industrial Court held as follows:

> [25] The dispute before this court revolves around the dismissal of the claimants from their respective employment with company which had been appointed as the Consultant for the Infrastructure Detailed Design for the Light Rail Transit Line 3 (LRT3) Project from Bandar Utama to Johan Setia (the Project). The total consultancy fees were in access of RM100 Million;
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> [26] The letter of appointment dated 8 August 2016 from Prasarana Malaysia Berhad (the Employer) to the company stipulates amongst other by clause 1(k) that:
>
> > The consultant's Project Director shall head the key personnel to provide the Consultancy Services. **Any changes to the list of key personnel and appointment of new key personnel shall**

require the employer's and/or PDP's prior written approval. The safety and well-being of the personnel are the responsibility of the Consultant and the Consultant shall indemnify the PDP for any outgoings, losses or costs arising out of any claims or action made by them for any reason whatsoever.

The Consultant shall also provide and be responsible for all necessary insurances relating to them and their employment and all works relating to the Consultancy Services to be carried out by the Consultant and the Consultant's staff;

[27] In line with the terms and conditions contained in the letter of appointment dated 8 August 2016, the company in appointing all the claimants as the resident engineers had incorporated in their letters of appointment a clause reflecting consistency with the terms contained in the letter of appointment dated 8 August 2016. Clause 14 of the letter of appointment of all the claimants expressly states the following:

14. Termination

Termination is upon completion of the assignment or where the client instructs a change of person due to incompetence or non-performance on yourself or if the Project does not complete its course or is terminated by the client ahead of schedule whichever is earlier. Either party maintains the right to terminate this appointment by giving not less than two months' notice in writing.

Gratuity shall not be paid to you if you opt to terminate your services with the company prior to completion of the project and subject to the proper handing over of all documents, *etc;*

[28] To put it clearly, as the appointment of all the claimants were on a fixed term contract of employment, pursuant to cl. 14 of the claimants' appointment letters, the company can only terminate their services for the following reasons or grounds:

(i) Upon the completion of the assignment namely the project or,

(ii) Where the client instructs a change of person due to incompetence or non-performance on part of the claimants or,

(iii) If the project does not complete its course or is terminated by the client ahead of schedule whichever is earlier.

[29] By incorporating the various grounds or reasons for which the claimants can be terminated from their employment, the company makes it abundantly clear that the company will not terminate the claimants if the three conditions listed above had not materialised or crystallised and will continue to keep them in employment until the expiry of their fixed term contract or the fulfilment of the condition expressed in cl. 14 above.

[30] It is clear from the evidence before this court that at the date of the termination of all the claimants on the 31 October 2018, the project had not been completed and in fact the project completion timeline had been revised from the original date of completion in 2020 to a later date in 2024. This can be seen from the Media Release of the Ministry of Finance dated 12 July 2018. All the claimants' fixed term contracts were also scheduled to expire in line with the original date of completion of the project through effluxion of time. So, it is clear from the wording of the letter of appointment dated 8 August 2016 from Prasarana Malaysia Berhad and the letters of appointment of all the claimants, the claimants will be kept in their respective employment until the expiry of their fixed term contract unless the conditions stated in cl. 14 is invoked for their termination.

[31] The evidence before this court does not show that the project had been completed which would give rise to the termination of the claimants from their respective employment with the company or through the expiry of their contract of employment by the effluxion of time. Further the evidence before this court also clearly shows that the project had not failed to complete its course or was terminated by the client ahead of schedule whichever is earlier. In the event the project had failed to complete its course or was terminated by the client ahead of schedule then the company could possibly succeed in its contention that in view of the failure of the project to complete its course or that it was terminated by the client ahead of schedule, a genuine redundancy situation had arisen giving reason for the company to reorganise or restructure its organisation which may likely lead to retrenchment of the claimants if there was surplus of labour.

[32] Now this court will move to the contents of the letters of termination issued to all the claimants. The reasons given by the company for the termination of all the claimants were the same. For convenience the salient part of the letters of termination of all the claimants is produced here which states that:

> … wish to inform you that we will be terminating your employment with MMSB. This is due the client's instruction to us to hold all works on stations, long span, depot buildings changes, *etc* as part of the LRT3 Cost Optimisation exercise by the Malaysia Government. Therefore, in accordance to cl. 14 of your employment contract, the company is giving you two months' notice with effect from 1 September 2018. As such, your last working day with the company would be 31 October 2018.
>
> As per cl. 4 of your contract, you are eligible to prorated gratuity. You will be required to close out and submit handover report to the satisfaction of your supervisor.
>
> Kindly note that it is with much regret that we had to resort to this action as there is no similar position at MMSB Consult at this point in time.

[33] Having perused the contents of the letters of termination, it is apparent to this court that the company had caused the termination of the claimants due to the client's instruction to hold all works on stations, long span, deport buildings changes etc as part of the LRT3 Cost Optimisation exercise by the Malaysia Government. By making this statement the company naturally concedes that it is bound by the conditions laid down in the appointment letter dated 8 August 2016 and the Ministry of Finance media release. However nowhere in the instruction from the client for the Cost Optimisation exercise by the Malaysian Government, there were any instructions for the company to terminate any of his key personnel. The company was also not able to show to this court any such instructions from the client or employer that permission had been obtained for the termination of any of its employee. This runs contrary to the very condition imposed by the employer as stated in the letter of appointment dated 8 August 2016. While the company is shown to be complying with the instruction of the client in holding all works on stations, long span, depot changes, in the absence of the any instruction from the client or employer as envisaged in the letter of appointment dated 8 August 2016 on the changes to the list of key personnel without any prior written approval will run contrary to the letter of appointment dated 8 August 2016 and cl. 14 of the appointment letters of the claimants. In any event the plain reading of the termination letters of the claimants clearly shows that the company itself cannot demonstrate with unequivocal and clear circumstances giving rise to a genuine redundancy of the claimants warranting their termination by way of retrenchment. At the time of issuing the termination letters on the 29 August 2018, it was the company's position that the client had instructed the company to hold the works carried out due to cost optimisation exercise by the Government of Malaysia but nowhere in the said letters it was intimated by the company that such instruction to hold the works had directly caused the redundancy of all the claimants. The 1st claimant had also given evidence that only certain parts of the project were put on hold and the rest of the work on the project proceeded as usual and the majority of the package was not affected and his job scope never ceased to exist.

In any event the actual Cost Optimisation exercise had also not taken place at the time the claimants were terminated and this was confirmed by both COW1 and COW2. The company had acted in haste in causing the retrenchment of the claimants when there is no clear proof or cogent reason that cost optimisation exercise must necessarily involve the termination of its employees especially the claimants in this case.

In fact, the letters of termination were issued on 29 August 2018 but the client's discussion with the company for the cost optimisation involving site staff reduction only took place on 29 October 2018 way after the claimants were informed that they will be terminated

on the 31 October 2018 and this can be seen from an email sent by one Wong Chan Keong of the client to one Dato' Ashok Kumar Sharma of the company.

[34] The company was not able to show that at the time of the termination of all the claimants, a genuine redundancy or surplus of labour had existed. There is no doubt that the claimants' roles and function remained and existed at the time or even after the termination of the claimants from their employment as these roles were taken over by other employees of the company.

[35] The company was clear in its intention when effecting the termination of all the claimants in that the reason for such termination was on account of cl. 14 of the appointment letter of all the claimants yet the evidence before this court quite clearly cannot justify the termination of the claimants pursuant to cl. 14 as none of the condition laid down in cl. 14 were triggered justifying the termination of all the claimants. The conduct of the company in terminating the claimants pursuant to cl. 14 of the appointment letters was clearly in breach of the claimants' contract of employment with the company that ensures security of tenure for the duration of their fixed term contracts of employment.

[36] The company is perfectly entitled to organise its business in the manner that it considers best but it must be done in a *bona fide* manner without engaging in unfair labour practices. The need for the termination of the key personnel/employees of the company and in particular the claimants here on genuine grounds must have been a fundamental term of the appointment of the company by the employer for otherwise the employer would not have inserted a key and important clause namely cl. 1(k) as stated above for the protection and well-being of the key personnel of the company. The claimants' letters of appointment also further placed emphasis on the genuine and acceptable reasons for the termination of the claimants' services in the company which the company must strictly comply.

[37] In selecting the claimants for the retrenchment exercise, the company had argued that it had conducted a selection process of all the claimants fairly based on their performance by way of appraisals conducted and that all the claimants were found to have scored low scores compared to other resident engineers. The points scored suggest that the claimants were poor performers. This court is not convinced in the circumstances of these cases before this court that the assessment and appraisals were conducted fairly as none of the claimants were informed that the assessments were done as corollary to COW2 having identified all the claimants for the purposes of retrenching them making the assessment and appraisal itself suspect. COW2 had himself identified the claimants as the target of termination by way of the retrenchment exercise and the appraisal and assessment done subsequently giving the

claimants low score, underscore the company's conduct to find justification for selecting the claimants for the retrenchment exercise and this speaks volumes why two resident engineers were spared of the appraisal process with no cogent reasons given by the company.

[38] This court had also perused the email from the Chief Resident Engineer, one Mr Siew Kam Leong, the person whom was referred to by COW2 as the person who had identified the claimants for the retrenchment exercise. The email from Siew Kam Leong dated 16 August 2018 very plainly does not reflect or demonstrate that a genuine redundancy situation had arisen giving reasons for the retrenchment of the claimants. The email plainly says that reductions of staff was for reason other than redundancy in that the employees identified were not performing their respective jobs. The company cannot use retrenchment process due to alleged redundancy in disguised to remove employees who are alleged to be poor performers or non-performers. For poor performance or non- performance, a different set of criteria must be satisfied by the company before the affected employees can be dismissed from their respective employment.

[39] Further to the above findings by this court, the company had also argued that MRCB-GK had expressed their dissatisfaction with the job performance of the first claimant and this had effectively put the company on notice that they would demand the first claimant's removal from the LRT3 project if matters did not improve. The 1st claimant however had dismissed these allegations of the company as baseless and maintained that he had performed his job professionally. This court finds that the 1st claimant's version is consistent with all the available documents before this court. There were no warning letters issued to the 1st claimant listing the specific matters of dissatisfaction regarding his job performance to enable him to respond. In any event the company or the client could have easily availed itself the conditions under cl. 14 of the first claimant's employment letter if there were sufficient reason to believe that the 1st claimant had been incompetent or found to be not performing his job to the satisfaction of the client which was not the case here.

[40] It is also the company's stance that there had been delays in payment from MRCB-GK which had seriously strained the company's resources and which had caused extreme difficulties for the company to pay its staff assigned to the LRT3 project and this was also one of the reasons for the company to restructure its operations in accordance with the cost reduction directives of the Malaysian Government. Despite the company stating that it was facing financial strain that was a factor taken into account for the restructuring exercise, the evidence before this court shows that the purported financial strain on the company did not prevent the company from hiring or recruiting new employees for the project and this was admitted by the company's witnesses. The company's version on its financial difficulties was not convincing enough to

this court to demonstrate its inability to maintain the workforce that included the four retrenched claimants. This court had taken into account that the total consultancy fees for the project that the company is entitled under the letter of appointment date 8 August 2016 was in access of RM100 million and how much of the said amount had been revised or reduced by a subsequent Novation Agreement dated 22 February 2019 is uncertain. The Novation Agreement itself was only signed after the claimants had been terminated from their respective employment from the company. The company was unable to show a breakdown of its total operating cost and the extent of the financial burden that it must shoulder if the four claimants were not retrenched.

[41] Having considered the evidence adduced before this court, this court is of the view that the evidence of the company's witnesses on the alleged bona fide restructuring and reorganisation of the company's business that led to the retrenchment of the claimants is not convincing. The selection of the claimants and in particular the 1st claimant here for retrenchment due to redundancy reveals unfair labour practices.

[42] Pursuant to s. 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this court finds that the company had failed to prove on the balance of probabilities that the dismissal of the claimant from his employment with the company was with just cause or excuse.

High Court's Decision

[18] The High Court was satisfied that the Industrial Court had committed errors of law which vitiated the awards. The High Court's analysis of the facts and the applicable law and the reasons for allowing the application for judicial review may be gleaned from the following parts of the grounds of judgment (see: *MMSB Consult Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor And Other Cases* [2024] CLJU 94; [2024] AMEJ 0089) which read as follows:

(16) Having perused the Industrial Court's Award, I am of the view that the Industrial Court erred in fact and law when it concluded that a redundancy situation could only arise in the circumstances explicitly stated in cl. 14 of the 2nd respondent's employment contract.

…

(18) Based on the above finding, the learned Chairman had applied a restrictive interpretation of the termination clause of the Employment Contract since the learned Chairman had made a

finding that the provision of cl. 14 of the Employment Contract had to be satisfied before the second respondent's employment could be terminated for any reason, including redundancy.

(19) However, in coming to his finding, the learned Chairman had failed to consider the express residual right to terminate the agreement reposed to both parties as envisaged in cl. 14 as follows:

> 14. Termination is upon completion of the assignment or where the client instructs a change of person due to incompetence or non-performance on yourself or if the Project does not complete its course or is terminated by the client ahead of schedule whichever is earlier. Either party maintains the right to terminate this appointment by giving not less than two months' notice in writing.

(20) Based on the above cl. 14, it is clear that the express conditions for termination relate to the automatic termination of the contract in circumstances outside the fixed term duration of the contract; and nothing precluded the applicant from terminating the 2nd respondent's employment for any other valid reason, such as misconduct, poor performance or, as in the instant case, redundancy.

(21) Therefore, I view that by holding that the 2nd respondent's termination could only validly come about by satisfying the specific conditions listed in cl. 14 of the employment contract, the Industrial Court had occasioned a clear error of law by failing to apply the appropriate principles of law which arise in connection with a claim of redundancy.

(22) Further, I am of the view that the Industrial Court, by confining its view to the conditions set out in cl. 14 of the employment contract, failed to apply the correct law or to ask itself the fundamental question as to whether a redundancy situation had, in law and in fact, arisen based on the circumstances of the case.

(23) Upon perusal of the evidence produced before the Industrial Court, I find that the Malaysian Government had directly suspended and placed the LRT Project under review, mandating that all stakeholders in the LRT Project implement stringent cost optimisation. The Malaysian Government's review culminated in a restructuring of the entire LRT3 project, which included significant changes such as an extended timeline for completion from 2020 to 2024 and a reduction to various deliverables.

(25) Premised on the above and reviewing the evidence that has been adduced, I am of the view the learned Chairman failed to consider that the applicant's decision to reorganise its business operations was a *bona fide* exercise in response to external forces which could not be deprecated or ignored. The Malaysian Government had directly suspended and reviewed the LRT3 project, culminating in significant changes to the same, specifically an extended timeline for completion and reductions to various deliverables.

A (26) The Industrial Court failed to adequately consider the appropriate legal test as to whether a genuine redundancy situation has arisen, and had thereby misdirected itself in law and fact.

(28) … The Industrial Court had made an error when it had concluded that based on the terms of the letter of appointment as between the
B applicant, Prasarana and MRCB-GK, clear instructions and/or permission had to be given to the applicant before it could validly dismiss the second respondent.

(29) I am of the view that the learned Chairman's findings on this issue are perverse and erroneous in law and in fact because:

C 29.1. Any alleged non-compliance with the provisions of the agreement between the applicant, Prasarana, and MRCB-GK has no bearing whatsoever on the question as to whether a bona fide redundancy situation has arisen.

29.2. There is neither any employment nor any contractual
D relationship between the second respondent and Prasarana and/or MRCB- GK, and therefore the absence of any approval or permission from those entities does not vitiate the validity of any retrenchment by the applicant.

(30) Further, this court is of the view that even if there is any such non-
E compliance, if it existed, it would be a contractual dispute between the applicant, Prasarana, and/or NRCB-GK, and thus, the Industrial Court had misdirected itself in law by holding that the terms of the agreement between the applicant, Prasarana, and MRCB-GK were determinative of the employment relationship between the Applicant and the second respondent.

F (31) I find that the Industrial Court had misdirected itself when concluded that the cost review exercise had not taken place at the time the second respondent's service was terminated and failed to consider the measures announced by the Malaysian Government according to the cost review exercise.

G (32) I find the finding of the learned Chairman on this issue is against and/or contrary to the Malaysian Government's own press release dated 12 July 2018, which makes expressly clear the outcome of its cost optimisation exercise. In this respect, the Ministry of Finance had stated *inter alia* as follows in the said press release:

H > The final total cost of the LRT3 project is reduced by 47% from RM31.65 billion to RM16.63 billion, saving Malaysians a total of RM15.02 billion. This cost will include project costs, including but not limited to Work Package Contracts (WPCs), land acquisition, project management, consultancy fees, operational and overhead costs, as well as interest during construction.

I …

(36) The Industrial Court also failed to consider the material effects of the changes announced by the Malaysian Government *vide* the press release dated 12 July 2012, in particular, the reduction in the scale of the LRT3 project and an extension of the project timeline where the applicant was required to do less work over a longer period of time.

(37) More importantly, I find that the second respondent had conceded during the proceeding before the Industrial Court that the changes announced by the Ministry of Finance in July 2018 would require restructuring by the applicant:

...

(41) Given the above, this court is of the view that by failing to take into consideration the material impact of the cost review exercise announced by the Malaysian Government, the impugned Award contains material infirmities of fact and law, in that it fails to adequately appreciate that as a result of the said exercise, which resulted in an extended deadline and a reduction to the scope of the LRT3 project, the applicant required fewer employees to do the work of the 2nd respondent.

(42) Added to that, I also find that not only did the Industrial Court reach an irrational conclusion when it held that the cost review exercise announced *vide* the press release had yet to occur at the time the 2nd respondent's services were terminated, but it had also failed to consider the actual effect of the exercise on the LRT3 project, and specifically the applicant's workforce requirements in relation thereto.

(50) Further, the Industrial Court committed a serious error of fact by determining that it was incumbent upon the applicant to take separate steps to address the 2nd respondent's performance, when poor performance was never the basis for the 2nd respondent's dismissal.

(51) The Industrial Court also failed to appreciate that the criteria employed by the applicant, to wit, assessing the resident engineers' respective performances, and taking into consideration complaints *vis-à-vis* the 2nd respondent's performance were a relevant matter for the applicant to take into consideration in selecting which staff to retrench from the LRT Project, and this is separate and distinct from a termination for poor performance.

(52) Further, the Industrial Court had entirely ignored the applicant's comparative organisation charts, which had reflected the consolidation of several positions and the removal of certain responsibilities, which were taken over by MRCB-GK.

(53) Added to that, I find that the Industrial Court did not address the clearly relevant fact that, under the applicant's new organisation charts, the 'Quality Assurance' no longer existed; moreover,

contemporaneous communications between the applicant and MRCB-GK further confirmed that the 'Quality Assurance' function would be MRCB-GK responsibility.

(54) Similarly, the Industrial Court did not address the fact that the other resident engineer roles were consolidated; for example, whereas there had previously been two resident engineer (M&E) roles, these had subsequently been combined into a single position.

(55) Premised on the reasons given above, I am of the view that the Industrial Court's findings as contained in the impugned award were marred by material errors of fact and law.

(56) The learned Chairman of the Industrial Court had occasioned a fundamental error when he construed the terms of the 2nd respondent's employment contract to mean that his employment could only be terminated pursuant to the three express conditions stated therein and for no other reason, including redundancy.

(57) The Industrial Court's error was further compounded when it further concluded that the contractual terms between the applicant, MRCB-GK and Prasarana directly affected the applicant's power to dismiss its employees.

(58) The Industrial Court occasioned further serious errors of fact and law when it concluded that the cost review exercise by the Malaysian Government had not yet been implemented as at the time of the 2nd respondent's dismissal, whereby it had failed to properly appreciate the press release by the Ministry of Finance dated 12 July 2018, and had furthermore failed to take into consideration the substantive effects of the changes announced by the Malaysian Government to the LRT3 project.

(59) Further, the Industrial Court erred in its appreciation and application of the selection criteria adopted by the applicant in selecting the 2nd respondent for redundancy, wherein the Industrial Court had applied the requirements for dismissal on the grounds of poor performance, which are inapplicable and irrelevant to the instant facts.

Our Decision

Judicial Review – The Law

[19] It is trite that the decision of the Industrial Court (the award) may be reviewed by the High Court for both process and substance on the grounds of "illegality", "irrationality" and "procedural impropriety". In this regard, the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 through a majority decision delivered by Eusoff Chin CJ (as he then was) had held as follows:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, *eg, Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155). This proposition, at full

face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

[20] In the case of *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748, the Court of Appeal through the judgment delivered by Gopal Sri Ram JCA (as he then was) held as follows:

In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

[21] In the case of *William Jack & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, the Court of Appeal through the judgment delivered by Gopal Sri Ram JCA (as he then was) had stated the following:

Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per S.K. Das J in *Hariprasad v. Divelkar AIR* [1957] SC 121 at p. 132).

Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he

considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.

[22] This appeal hinges on two main issues for this court's determination, which are:

(i) redundancy/retrenchment; and

(ii) premature dismissal.

[23] Learned counsel for the claimants argued that redundancy was not made out for the following reasons:

(i) there was no proof in support of redundancy. The organisational chart after the retrenchment of the claimant shows the same number of employees working on the project as before the claimants' retrenchment;

(ii) there was no freeze in new hires for the project. This fact was agreed upon by COW1 witness during cross-examination;

(iii) there was no proof tendered to show genuine financial need for retrenchment to take place. No audited financial statement to show the finances of the company requires retrenchment. This fact was agreed upon by COW2 witness during cross-examination; and

(iv) The retrenched personnel were handpicked before the performance appraisal was done to justify the decision instead of the performance appraisal done to pick the personnel to be retrenched.

[24] Lastly, counsel for the claimants strenuously contended that the dismissal due to redundancy was premature, based among others as follows:

(i) the whole cost reduction exercise was only finalised by way of novation agreement which was dated 22 February 2019, a few months after the claimants termination on 31 October 2018;

(ii) there was no proof tendered to show genuine financial need for retrenchment to take place. No audited financial statement to show that the finances of the company require retrenchment; and

(iii) there was nothing to suggest that there was written instruction from MRCB-GK or Prasarana for the termination of any of the project's key personnel.

[25] It would be convenient if the first deal with the issue was the retrenchment being premature. Thus, the building blocks or need for restructuring of the project and consolidation of job-functioning *etc,* were all progressing or in motion wheel before the retrenchment took place *via* the letter dated 29 August 2018. This aspect of the evidence clearly negates the suggestion that the retrenchment was premature.

[26] On the issue of the retrenchment being premature, based on the MOF's announcement dated 12 July 2018, it is quite clear and obvious that the matter had been "thoroughly renegotiated" with the stakeholders, including Prasarana, MRCB-George Kent Sdn Bhd and MMSB (the employer of the claimants). Hence, all parties were in the loop of the MOF renegotiations and were aware of the decision by the cabinet to shave off 47% from the project costs which had a direct impact on consultants' fees *etc, ie,* people like the claimants. The MOF media release reads (relevantly) as follows:

> Cabinet, at its meeting yesterday has approved the continuation of the LRT3 project at a final cost of RM16.63 billion. The final total cost of the LRT3 project is reduced by 47% from RM31.65 billion to RM16.63 bilion, saving Malaysians a total of RM15.02 billion. This cost will include all project costs, including but not limited to Work Package Contracts (WPC), land acquisition, project management, consultancy fees, operational and overhead costs, as well as interest during construction.
>
> The 37km Light Rail Transit 3 (LRT3) project is a critical project meant to alleviate the issue of traffic congestion along one of the most important and densely populated economic development corridors in the Klang Valley, from Klang to Petaling Jaya. The new LRT line is expected to serve a 2-million population with the capacity to transport 36,700 passenger per hour each way.
>
> A thorough renegotiation and rationalise exercise of the LRT3 project was undertaken with all key stakeholders including Prasarana, MRCB-George Kent joint venture (MRCB-GK JV) who is the Project Delivery Partner (PDP) and Land Public Transportation Commission (SPAD). One critical criterion for the review was that the integrity of the 37km LRT3 line from Johan Setia (Klang) to Bandar Utama (Petaling Jaya) must be maintained. In addition, the safety, frequency and quality of service must meet the requirements of the regulators.
>
> Among the key steps taken to reduce and rationalise the cost of the project include:
>
> (i) Reducing the order of 42 sets of 6-car trains to 22 sets of 3-car trains. Based on the feasibility study of the LRT3 project, the 22 sets of 3-car trains is more than sufficient to cope with the anticipated passenger demand until the year 2035 before additional 3-car trains need to be ordered.
>
> (ii) Reducing the construction size of the LRT train depot due to the significantly reduced number of LRT trains to be acquired.
>
> (iii) Streamiring the size and design of the LRT Stations based on Kelana Jaya LRT line standards instead of being bench marked against the much larger MRT stations.
>
> (iv) …

(v) Cancelling an unnecessary 2km tunnel for the LRT together with an underground station at Persiaran Hishamuddin, Shah Alam.

(vi) Extending the time line to complete the LRT3 project from 2020 2024 in order to reduce construction cost which was inflated due to 'acceleration costs' *ie,* to speed up the project incurs additional costs.

In addition, the construction of the LRT3 project will be restructured from a PDP model to a "fixed price contract" with MRCB-GK JV. This will ensure that the price will be fixed and will not be subject to cost overruns. The details of this contract will be disclosed at a later stage. The savings of more than RM15 billion would not only mean a massive reduction of RM15 billion in debt to be incurred, but also result in additional savings to the taxpayers of up to RM14 billion in interest cost over the period of the loan financing.

The 47% reduction in cost demonstrates that the new Federal Government is walking the talk in securing significant cost reductions for excessively-priced project caused by the poor governance of the previous government.

[27] As for the issue of selection of persons to be retrenched, it is to be emphasised that the claimants were not dismissed for poor performance. The Industrial Court erred in conclusion that they were terminated for poor performance. The claimants had various shortcomings *etc,* whilst they may have some explanations for shortcoming, the end result is that in a situation where cost-cutting measures are to be implemented, it is the prerogative of the employer to decide who should be retained and who should be released.

[28] The claimants themselves had conceded that Roger Siew was the correct person to appraise them. The outcome was that the claimants scored less than the others. Of course, it is true that there the two other resident engineers who were not appraised but they had their own value-add bring to the company. For example, another resident engineer, Kawaljeet had superior experience as compared to the claimants and we also had a relationship with Jabatan Kerja Raya (JKR) which was important for the company.

[29] Likewise, Yong Woo Chuan (also a resident engineer) was someone who had depot experience which the claimants did not. It is also important to emphasize that the claimants were all on "fixed-term" contracts. As such, this is not a 'Last in First Out' (LIFO) situation. We find nothing sinister about the fact that Yong Woo Chuan and Kawaljeet not being appraised and were not retrenched.

[30] As for cl. 14 of the contract of employment, the Industrial Court seemed to think that the fixed-term contract precludes termination due to redundancy. We disagree with the Industrial Court's conclusion in this regard. In our view, there is no legal impediment to an employer retrenching

staff who are on fixed term contracts due to redundancy situation. Further, we take the view that there is no legal basis for the suggestion that the company needs MRCB-GK's approval or Prasarana's approval before the claimants were retrenched, as MRCB-GK and Prasarana were not their employer.

[31] The final issue is whether there was a genuine redundancy. On this point, the Industrial Court had opined at [34] as follows:

Redundancy

[34] The company was not able to show that at the time of the termination of all the claimants, a genuine redundancy or surplus of labour had existed. There is no doubt that the claimants' roles and function remained and existed at the time or even after the termination of the claimants from their employment as these roles were taken over by other employees of the company.

[32] There is in our view a general misconception that redundancy only arise when the job or work that was carried out by the claimant who had been retrenched no longer exists. In the English case of *Chapman & Others v. Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063, [1973] ICR 310 the English Court of Appeal held that the statutory test whether a workman had been dismissed for by reason of redundancy was simply whether there has been a cessation of, or diminution in, the requirements of the respondents' business for employees to carry out the kind of work on which the appellants had been engaged. Lord Buckley LJ (as he was then) stated (@ p.316 ICR) as follows:

The plaintiffs were dismissed from their employment by the defendant company, and accordingly the burden of proving that they were not dismissed by reason of redundancy lies upon the defendant company. Section 1(2), so far as relevant to the present case, provides that for the purposes of the Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that the requirements of the business for the purposes of which he was employed for employees to carry out work of particular kind have ceased or diminished or are expected to cease or diminish. So, the burden resting upon the defendant company in the present case is to establish that on the facts of the case that criterion is not satisfied.

[33] The case of *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] CLJU 131; [1999] 3 MLJ 411 (HC) clearly and we may add, correctly illustrates that redundancy does not necessarily mean the job or work no longer exists. Redundancy arises when an employer requires fewer employees of a certain type due to a restructuring or redistribution of work. In *Stephen Bong*'s case, the High Court had enunciated the legal position to be as follows:

> … it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind (*'Harvey on Industrial Disputes'*). In the case before me, it is the company's case that **there was reduced work and reduced business, which made the applicant's position as an executive director in charge of one group redundant.** The Industrial Court is right when it held that the applicant was redundant.
>
> (emphasis added)

[34] In our view, redundancy arises when there is a surplus of labour which is linked to legitimate business needs of the employees. Thus, the Industrial Court is duty bound and determine to evaluate whether the retrenchment was both justified by the circumstances and was conducted in good faith. It goes without saying that there must be an absence of any malicious intent. It is trite that employers retain the managerial discretion to reorganise their business, provided such actions are *bona fide*, and judicial interference is limited to instances where bad faith or ulterior motives are demonstrated. At any rate, what is critical is that the employer has to demonstrate the existence of a genuine redundancy situation.

[35] Thus, redundancy is by definition, intrinsically linked to the concept of surplus labour, which generally emerges from a reorganisation or restructuring of a business. This principle was extensively examined by the Court of Appeal in *Woo Vain Chan v. Malayawata Steel Bhd* [2016] 10 CLJ 176, where the issue of redundancy was clarified and the legal position stated in the following terms;

> [24] Looking at the decision of the learned HCJ, we noted that the learned HCJ had spelt out the law on redundancy and she had cited the case of *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] CLJU 131; [1999] 1 LNS 131; [1999] 3 MLJ 411 and concluded that *just because the duties of the respondent continued to exist does not mean that there was no redundancy. At para.* [5] of her grounds of judgment ("GOJ") she had quoted a portion of the decision of the court in the *Stephen Bong* case *(supra)* as follows:
>
> > *It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind.* The Industrial Court was right when it held that the applicant was redundant as there was reduced work and reduced business within the company which made the applicant's position as an executive director in charge of one of the groups redundant.
>
> [25] *It was her view that redundancy would happen in a business organisation when it "requires fewer employees to conduct the same amount of work or reduced amount of work."* Based on that statement of the law as regards redundancy, the learned HCJ proceeded to apply the same to the factual matrix before her in the JR application. This was what she had said in the same para. [5] of the GOJ:

It was the decision of the Industrial Court that there was no redundancy as the duties of the respondent still very much existed at the time of termination. With due respect, *the fact that the duties of the respondent continued to exist does not mean that there was no redundancy.*

[26] At the outset, we were of the considered view that *there was nothing wrong with the learned HCJ's narration of the legal principle on what would amount in law to a redundancy situation. In fact, the position can be considered as trite.* The law reports, as well as the body of literature on the subject-matter abound and would not require us to restate what the position is. It had boiled down to how the law was applied to the facts as unfolded through the evidence as led by the witnesses led by both parties.

[27] Premised as it were, on the law on redundancy, the learned HCJ had concluded at para. [10] in her GOJ as follows:

> In this instance, there was evidence that nobody was appointed to replace the respondent and that his duties were taken over by the administrative department. This clearly shows that the respondent's duties and responsibilities were adequately performed by existing personnel which goes to show that the respondent's position was no longer required and he was a surplus to the requirement of the applicant.

[28] This was where the learned HCJ had departed from the learned CIC as to whether there was in fact, as per the evidence adduced by both parties in the IC, a redundancy situation as envisaged by the law.

[29] Before us, it was also contended by learned counsel for the appellant that the learned HCJ had erred when she interfered with the finding of facts made by the learned CIC. It was contended that the HCJ had overstepped her supervisory jurisdiction when she did that.

[30] In this case, we observed that in departing from the findings of facts made by the learned CIC, the learned HCJ had concluded that "there was evidence that nobody was appointed to replace the respondent and that his duties were taken over by the administrative department". Based on this observation, the learned HCJ was of the view that such evidence had clearly shown that there was no longer any need to retain the appellant in the company. In other words, the appellant had indeed become "a surplus to the requirement of the applicant."

[31] We must state here that the learned HCJ apart from making that conclusion, did not allude to any evidence that could amplify how the learned CIC was in error when she came to her conclusion in coming to the award that she did. With respect, we had looked at the record of appeal, in particular, the notes of proceedings in the IC, and we were of the view that the learned CIC was justified in

coming to the conclusions that she did. It needed to be borne in mind that the HC in a JR application exercises a supervisory function as opposed to its appellate functions. The scope of the supervisory role is of a much narrow import as compared to the appellate role. While there is nothing wrong, *ipso facto*, for the HC to depart from the findings of facts made by the CIC, there is however, a huge caveat to be attached to that statement, as can be seen in the Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 ("*Ranjit Kaur* case"). The apex court there had occasion to say the following:

> The Federal Court, in *Petroleum National Berhad v. Nik Ramli* [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[32] We had looked at the award of the learned CIC and with regard to her findings of facts pertaining to the crucial issue of whether the respondent had established the *factum* of redundancy, we noted that she had made the following findings, which appear in her GOJ. We now reproduce the same:

(1) The law recognised a company's right to organise its business in the manner it considers best. However, in doing so, the company must act *bona fide* and not capriciously or with motive of victimisation or unfair labour practice.

(2) The company did not adduce any evidence to substantiate its averment that it was operating under a very challenging set of circumstances at the material time when it was dealing with difficulties posed by the reduction in demand for its products, weak collection and escalating costs. On the contrary the company admitted that the claimant was paid a discretionary bonus of RM25,000 in 2001 in recognition of his services for that year. On the evidence, the company did not prove the alleged prevailing circumstances necessitating the company's retrenchment of the claimant's services.

(3) There was no evidence adduced that the claimant was not able to fulfil what was required of him at the time of his retrenchment. Further, that submission had no merit as COW1, for the company, had admitted under cross-examination that the claimant's performance was not an issue. That apart, the evidence adduced showed that a substantial amount of the claimant's duties and responsibilities still existed at the time of the claimant's retrenchment.

(4) Based on the evidence, the company's alleged retrenchment exercise was not *bona fide*. The claimant was fully aware of the company's direction which was also discussed in the company's senior executives' dialogue forum 2003. The company had offered VSS to four of its high-ranking employees including the claimant and the claimant was paid RM60,000. The company had no reason to terminate the claimant's employment and the claimant was the only one retrenched. In the circumstances, the dismissal was clearly an unfair labour practice. It followed that a case of retrenchment had not been made out on a balance of probabilities. The company had not acted *bona fide* in the termination of the claimant's services.

[33] These findings were all based on the evidence of witnesses called by both parties as could be seen on the grounds of decision of the learned CIC. It would require some strong findings to the contrary to displace what the learned CIC found as having been proven and unproven, pertaining to the various allegations of facts, in order to upset and quash her award.

(emphasis added)

[36] Although of the facts, the decision in *Woo Vain Chain* was in favour of the claimant, the legal position that was alluded to is that just because the duties of the claimant continued to exist does not mean that there was no redundancy. On the facts in *Woo Vain Chain*, the employer did not produce any evidence to substantial that it was operating under a very challenging set of circumstances. However, in the instant appeals before, there is undisputable evidence of a need for cost optimising/cost review as per MOF's direction.

[37] In our view, where an employer's business/operational needs results in or necessitates a reduction in the number of employees then redundancy may be said to arise in those circumstances. So, in a redundancy, the work may continue to exist, but it is done by a fewer number of employees. However, it is necessary for us to comment on the decision of the Court of Appeal in *Melipoly Enterprise Sdn Bhd v. Ong Hong Yeok & Anor* [2024] 4 CLJ 692, where the Court of Appeal held that there was no redundancy because the claimant's job continued to exist, *albeit* taken over by someone else. In that case, the claimant served with the appellant as its Marketing Manager before his employment was terminated. The termination, as stated in the letter of termination, was due to the prevailing economic recession and prolonged period of poor sales revenue. Dissatisfied, the claimant sought advice from the Department of Industrial Relations but the reconciliation sessions did not materialise.

[38] The claimant's representation was then referred to the second respondent ('Industrial Court') and the latter found that the former was dismissed without just cause and excuse. The appellant applied for a judicial

review at the High Court and the said application was dismissed. The High Court found that, *inter alia*, (i) the appellant relied on other grounds of termination not stated in the letter of termination, namely, unsatisfactory performance, conflict of interest and sexual harassment; and (ii) the Industrial Court was right in ruling that it had jurisdiction to hear the claimant's case notwithstanding that he no longer wanted reinstatement by the time of the hearing as he was gainfully employed in another company. The issues that arose for adjudication were: (i) whether the termination was with just cause or excuse; and (ii) the jurisdiction of the Industrial Court to inquire into the reference and award damages or relief when the claimant had testified that he did not wish to be reinstated. The High Court dismissed the judicial review. The Court of Appeal dismissed the appeal.

[39] The Court of Appeal's reasons for upholding the Industrial Court's ruling and the High Court's ruling that there was no redundancy may be gleaned from the following paragraphs of the Court of Appeal's grounds of judgment:

> [30] A perusal of the letter of termination shows that the reasons given were "current economic recession" and "prolonged period of poor sales revenue".
>
> [31] It is trite that the appellant can only rely on the reasons as stated in the letter of termination and no only reason. We therefore agree with the HCJ that the appellant could not rely on other grounds such as unsatisfactory performance, conflict of interest and sexual harassment.
>
> [32] To drive home this point, we refer to *Goon Kwee Phoy* where the Federal Court stated at p. 136:
>
> > We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[33] In Maritime Intelligence, the same too was said by the Federal Court at p. 687:

> [51] In summary, on this point, it is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s. 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman.

[34] The Federal Court dwelt at length with *Goon Kwee Phoy* and cited the same passage as we did earlier and went on as follows at p. 690:

> [69] This portion of the passage restricts the enquiry of the Industrial Court to the reasons given for the action taken by the employer. That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal. This court in *Goon Kwee Phoy* (above) arrived at the same point as we did, in the earlier paragraphs of this judgment, far more pithily, but utilising the same rationale.

[35] With regard to the stated grounds as given in the letter of termination, we are of the considered opinion that the statement of comprehensive income was evidence that the appellant was suffering financial losses occasioned by the current economic recession and prolonged period of poor sales revenue. We refer to encl. 6-123-124 which is the appellant's statement of comprehensive income for the period 1 October 2018 to 31 March 2019, which shows a net loss of RM582,546.72. The first respondent was aware of the financial situation as per his witness statement Q&A 3 (encl. 5/66) where he agreed to waive RM1,000 per month for three months believing that the company will repay the sum when the company's financials are stabilised.

[36] However, we found that the appellant had failed to prove redundancy. We say so for the following reasons.

[37] In *William Jacks*, it has been said at p. 241:

> ... The issue before that court was whether there was a genuine retrenchment exercise *vis-a-vis* the respondent. Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise

A than as a punishment inflicted by way of disciplinary action" (per S.K. Das J in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p. 132).

Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.

[38] Reference is further made to *Ng Chang Seng* at pp. 381 to 382 (CLJ); p. 468 (MLJ):

[63] As stated the burden of proof is always on the company to show before the Industrial Court that the termination on ground of retrenchment arising out of redundancy is for a just cause or excuse and that it is lawful and not actuated by irrelevant considerations like poor performance or perceived insubordination or that it was not done *mala fide* and did not reek of unfair labour practice. The Industrial Court found as a matter of fact that the company had failed to discharge its burden of proof.

[39] Essentially, the retrenchment must be *bona fide* for which we confine ourselves to the four corners of the letter of termination where the grounds are stated. We recognise the management prerogative of reorganisation but subject always to it being exercised *bona fide*.

[40] The evidence was that the appellant's managing director Almond Siah was transferred back to Malaysia to take over the first respondent's function as marketing manager for a few outlets. Prior to 1 March 2018, the first respondent was managing five outlets. After March 2018, the first respondent was managing three outlets which were Village Agro Park, Cameron Highlands and Kampar Free Park. Refer to the first respondent's cross-examination in encl. 7/162.

[41] This would mean that the first respondent's function and work as marketing manager was reduced but never eliminated. As was said in *Woo Vain Chan* at pp. 181 to 182 (CLJ); p. 855 (MLJ):

[17] Another essential feature that needed to be considered in determining whether redundancy existed in an organisation, would be to see whether 'the work continues to exist or whether the work although continuing to exist requires

> fewer employees to carry it out. The restructuring or reorganisation that is carried out must result in redundancy, that is, it must result in a situation of cessation of work carried out by the employee(s) or a surplus of employees to carry out the particular job function. The issue is whether the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. It is essential that it is the job functions and duties that are affected and not merely the job title or designation. If the same or essentially same work is found to be carried out under a different name or manner, there is no redundancy ... (see *The Law on Dismissal* by Nallini Pathmanathan, Siva Kumar Kanagasabai and Selvamalar Alagaratnam).
>
> [42] We conclude on this point that the termination was without just cause and excuse and the retrenchment was not *bona fide*.

[40] It is quite clear that in *Melipoly*'s case there were a host of other vitiating factors which had contaminated the employer's *bona fides vis-à-vis* the purported retrenchment. However, it remains the case that notwithstanding the outcome in that case which went against the employer, the basic principle is that retrenchment is "the discharge of surplus labour or staff by an employer for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action." (See: *Hariprasad v. Divelkar* [1957] AIR SC 121). As such, by definition, retrenchment is not punitive and is a manifestation and exercise of a management prerogative which is aligned with the operational requirements of the business.

[41] The standard of proof on an employer to establish redundancy is not and should not be unduly burdensome. In this regard we endorse the principle that was applied by the Industrial Court in *Siemens Malaysia Sdn Bhd v. Cheong Kok Leng* [2004] 1 ILR 195 (Award No. 1010 of 2003), where it was held:

> The tribunal cannot demand an 'excessively high standard of proof' of a redundancy. The employer is not obliged to produce 'accounts or figures to show the loss referred to, how it was sustained and how much it came to', nor does the employer have to show 'that the redundancy situation was so bad as to cause the dismissal'; nor is there any 'obligation on the employers to establish the existence of some economic or accountancy state of affairs which would, as it were, justify the declaration of a state of redundancy' in order to establish the necessary facts to show that the dismissal was because of redundancy: *H Goodwin Ltd v. Fitzmaurice* [1997] IRLR 393. Once a redundancy has been established then it is not open to the tribunal to consider the actions of the employer which led to the redundancy situation. Tribunals are not there to make findings about the

A way in which the employer has conducted the business: *Moon v. Homeworthy Furniture (Northern) Ltd* [1977] ICR 117. In *Guy v. Delanair (Car Heater) Ltd* [1975] IRLR 73, the company decided to do away with the redundancy situation. The tribunal found it 'is not in a position to criticise the manner in which an employer decides its work must be cut down'. The tribunal was not prepared to consider whether the
B redundancies were necessary.

[42] On the facts here, we agree with the learned judge of the High Court who opined that the retrenchment was necessitated by the cost review/optimisation exercise which was conceded during the hearing before the Industrial Court that the changes announced by the MOF would necessitate
C restructuring by the company. Notwithstanding the comments by the Court of Appeal in *Melipoly*'s case (which we do not agree with), there was in this case a genuine case of redundancy because "the work although continuing to exist required fewer employees to carry it out".

D **[43]** The Industrial Court's error lay in its failure to consider the fiscal impact of the cost review/optimisation exercise on the company's financial ability to sustain the existing workforce and in disregarding the evidence that the roles and functions of the claimants had been consolidated (See: para. [15] of the company's statement of reply) which resulted in a surplus of resident
E engineers.

[44] Thus, the fact that the retrenched employee's job function continued to exist and is being done by a lesser number of existing (non-retrenched) staff is not a case of no redundancy. On the contrary, it is because the employer has decided to downsize its operations that there is now a need for fewer staff
F to do the same job. Thus, in such a situation, the retrenched employee is deemed to be "surplus" to the employer's needs. It is important to emphasise that there was no hiring of any new resident engineers to do the job that was performed by the claimants.

[45] In all circumstances, we find that the Industrial Court awards in
G respect of the claimants were tainted with errors of law and the High Court was correct in allowing the judicial review and quashing the awards. Consequently, for the reasons as stated above, the appeals are dismissed with costs of RM3,000 (subject to allocator) for each appeal.

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